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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAVIER AUGUSTO QUINTEROS, Defendant and Appellant.	F076067 (Super. Ct. No. 1415611) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. John D. Freeland, Judge.

Stephen M. Lathrop, under appointment by the Court of Appeal, Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Franson, Acting P.J., Peña, J. and Smith, J.

Defendant Javier Augusto Quinteros appeals from a resentencing on remand after our reversal of his sentence in a prior appeal. (See *People v. Quinteros* (Jan. 24, 2017, F070508) [nonpub. opn.].) He maintains that the trial court again erred, this time by failing to obtain a supplemental probation officer's report. This report, he maintains, was mandatory and was not waived by him; and it was necessary to inform the court's sentencing discretion by supplying facts about his conduct and activities during the two years and eight months since the original probation report. The People concede that the supplemental report was mandatory and unwaived, but contend that the error of not obtaining it was harmless. We disagree, reverse the sentence, and again remand.

BACKGROUND

Quinteros sexually abused his two stepdaughters over a period of many years. He was convicted after a jury trial of two counts of continuous sexual abuse of children under age 14, plus one count each of sodomy and oral copulation, both with children age 14 or younger and 10 or more years younger than Quinteros. (Pen. Code, §§ 288.5, subd. (a), 286, subd. (c)(1), 288a, subd. (c)(1).)[1] He was sentenced to an aggregate term of 38 years to life: two consecutive terms of 15 years to life for continuous sexual abuse, a consecutive six years for sodomy, and a consecutive two years for oral copulation. (*People v. Quinteros, supra*, F070508, at pp. 2-3.)

The life terms were based on former section 667.61, subdivision (e)(4), which provides for such sentences in cases of continuous sexual abuse of a child where the defendant has multiple victims, as Quinteros did. The jury did not find, however, that any portion of the continuous abuse took place on or after September 20, 2006, when this sentencing provision took effect. The life terms, consequently, violated the ex post facto provisions of the state and federal Constitutions. (*People v. Quinteros, supra,* F070508, at pp. 3-6.) In addition, the sentencing court expressed a belief that consecutive

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[1] Subsequent statutory references are to the Penal Code unless otherwise noted.

sentences were mandatory for the sodomy and oral copulation counts. This was incorrect, as the relevant statute regarding mandatory consecutive sentences, section 667.6, subdivision (d), was inapplicable to those offenses. (*People v. Quinteros, supra*, F070508, at p. 6.) In our prior opinion in this case, we vacated the sentence and remanded for resentencing. (*People v. Quinteros, supra,* F070508, at p. 7.)

On remand, the trial court imposed a determinate sentence of 28 years, calculated as follows: for the two counts of continuous sexual abuse, consecutive middle terms of 12 years each; for sodomy, two years consecutive, equal to one-third of the middle term; and for oral copulation, two years consecutive, equal to one-third of the middle term.

At the resentencing hearing on June 21, 2017, the probation report and supporting Static-99 report from the original sentencing, both dated October 24, 2014, were before the court. The record does not contain or reference any more recent probation report or Static-99 report. In the parties' briefs, it is undisputed that none were prepared.

DISCUSSION

California Rules of Court, rule 4.411, provides:

> **"(a) When required**
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> "[Except] [a]s[2] provided in subdivision (b), the court must refer the case to the probation officer for:
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> "(1) A presentence investigation and report if the defendant:
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> > "(A) Is statutorily eligible for probation or a term of imprisonment in county jail under section 1170(h); or
> >
> > "(B) Is not eligible for probation but a report is needed to assist the court with other sentencing issues, including the determination of the proper amount of restitution fine;

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2 In the rule's text, this sentence begins "As provided." The sense requires "Except as provided."

> "(2) A supplemental report if a significant period of time has passed since the original report was prepared.
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> **"(b) Waiver of the investigation and report**
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> "The parties may stipulate to the waiver of the probation officer's investigation and report in writing or in open court and entered in the minutes, and with the consent of the court. In deciding whether to consent to the waiver, the court should consider whether the information in the report would assist in the resolution of any current or future sentencing issues, or would assist in the effective supervision of the person. A waiver under this section does not affect the requirement under section 1203c that a probation report be created when the court commits a person to state prison."

As the parties agree, this rule *requires* the sentencing court to obtain a supplemental report if (1) the defendant is statutorily eligible for probation; (2) in the words of the Advisory Committee comment, "the defendant is to be resentenced a significant time after the original sentencing, as, for example, after a remand by an appellate court" (Advisory Com. Com., 23 pt. 2 West's Ann. Codes, Court Rules (2018 supp.) foll. rule 4.411); and (3) there has been no waiver by stipulation of both parties in writing or in open court and entered on the minutes, with the court's consent.

The requirement that a waiver be approved by the court and be made by stipulation of both parties in writing or in open court was added to the rule only recently, as part of an amendment effective January 1, 2018. The People do not dispute the applicability of the provision, however. This is undoubtedly because the provision is based on a statute, section 1203, subdivision (b)(4), which was in effect at all relevant times.

The People concede that Quinteros was statutorily eligible for probation. They also concede that the time between October 23, 2014, and June 21, 2017, about two years and eight months, is a significant period of time. Finally, they concede that even though the matter was not raised below, there is no waiver or forfeiture because of the requirement that a waiver be with the court's consent, and made in writing or in open

court and entered on the minutes. The only question remaining is whether the court's erroneous failure to obtain a supplemental report was harmless. That question is analyzed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836: The error requires reversal if it is reasonably probable that the defendant would have obtained a more favorable result absent the error. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 182 (*Dobbins*).)

The Advisory Committee comment on rule 4.411(a)(2), describes, among other things, some of the circumstances in which a new report would not be necessary even if within the actual terms of the rule:

> "Subdivision (a)(2) is based on case law that generally requires a supplemental report if the defendant is to be resentenced a significant time after the original sentencing, as, for example, after a remand by an appellate court, or after the apprehension of a defendant who failed to appear at sentencing. The rule is not intended to expand on the requirements of those cases.
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> "The rule does not require a new investigation and report if a recent report is available and can be incorporated by reference and there is no indication of changed circumstances. This is particularly true if a report is needed only for the Department of Corrections and Rehabilitation because the defendant has waived a report and agreed to a prison sentence. If a full report was prepared in another case in the same or another jurisdiction within the preceding six months, during which time the defendant was in custody, and that report is available to the Department of Corrections and Rehabilitation, it is unlikely that a new investigation is needed." (Advisory Com. Com., 23 pt. 2 West's Ann. Codes, Court Rules, *supra*, foll. rule 4.411.)

The following hypothetical sequence of events, based on this Advisory Committee comment, is an example of a situation in which, although a significant period of time has passed between the preparation of the original report and a resentencing (and the defendant is eligible for probation and there has been no waiver), the lack of a supplemental report for the resentencing would be inconsequential and thus harmless:

- Year 1: Defendant is convicted in case 1; probation report is prepared, and defendant receives prison term.
- Year 3: Sentence in case 1 is reversed on appeal and remanded for resentencing.
- Year 3.1: In case 2, defendant commits a new offense in prison.
- Year 3.2: Defendant is convicted in case 2.
- Year 3.3: Probation report is prepared for case 2. Sentencing in case 2 is conducted. Probation report is provided to court and CDCR.
- Year 3.4: Resentencing in case 1 is conducted using original case 1 probation report and new case 2 probation report.

There would be no need for a supplemental probation report for the resentencing in case 1 because a full report was prepared in another case within the preceding six months, during which time the defendant was in custody, and there is no indication of changed circumstances.

In Quinteros's case, the argument for harmlessness has nothing to do with anything as solid as the known availability of an acceptable official *substitute* for the mandatory supplemental report, as contemplated by the Advisory Committee. Instead, the prejudice question hinges on the chances that an updated report, contents unknown, would have turned out to contain information favorable to Quinteros, relevant to the exercise of the court's sentencing discretion, and sufficiently material to persuade the sentencing court to order a more lenient disposition. As we will explain, a failure to obtain a supplemental probation report under these circumstances was not harmless under the *Watson* standard.

Of the four cases cited by the People in the very short section of their brief regarding prejudicial or harmless error,[3] none are squarely on point, [4] but two contain

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[3] Of the six and a half pages of legal analysis in the People's brief, six are filled with long-winded, grudging concessions that the court erred and prejudice is the only issue in dispute on appeal, plus boilerplate language on the standard of review and the

some pertinent discussion—as alternative holdings or dicta—about the prejudicial effect or lack of a prejudicial effect of a missing supplemental report. These are *Begnaud, supra,* 235 Cal.App.3d 1548 and *Llamas, supra,* 67 Cal.App.4th 35. A third case cited by the People (but not in support of their prejudice analysis), *Dobbins, supra,* 127 Cal.App.4th 176, analyzes this issue as well. As will be seen, these cases present three different scenarios with a missing supplemental report: (1) the record contains no information at all about the defendant in the time after the original report was prepared; (2) the record contains some such information, in the form of representations by defense counsel or statements by the defendant at the second sentencing hearing; and (3) the record contains some such information, from sources independent of the defense, such as documentary evidence of programs completed and the like. These three scenarios have different consequences for the prejudice analysis.

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like. Only on the final half page do the People actually attempt to give reasons why the error was not prejudicial.

4 In three of the cases, the defendant was statutorily ineligible for probation, so the report was not mandatory, and the strict limits on waiver did not apply. Either the trial court acted within its discretion in not ordering a new report, or the defendant waived the issue by not raising it in the trial court. (*People v. Johnson* (1999) 70 Cal.App.4th 1429, 1431-1432 (*Johnson*) [defendant statutorily ineligible for probation, so waiver by failure to request supplemental report was effective]; *People v. Llamas* (1998) 67 Cal.App.4th 35, 39-40 (*Llamas*) [defendant statutorily ineligible for probation and no abuse of discretion shown]; *People v. Bullock* (1994) 26 Cal.App.4th 985, 986-987, 990-991 [defendant statutorily ineligible for probation and no abuse of discretion shown].)

In the fourth case, *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1554-1556 (*Begnaud*), the defendant *was* eligible for probation, but the Court of Appeal still held that he waived the issue of the supplemental probation report by not raising it in the trial court. That case is distinguishable from this one for a different reason: In 1991, when it was decided, section 1203, subdivision (b)(4)—on which the Rule of Court imposing strict requirements on waiver was later based—had not been enacted yet. (See *Johnson, supra,* 70 Cal.App.4th at pp. 1431-1432.)

Begnaud is the silent record situation—no information at all about the defendant in the time after the original report. The appellate court stated in a footnote that, even without waiver, it would have denied relief because the defendant did not show prejudice. Prejudice was not shown precisely *because* no information about the defendant in the time following the original probation report was brought to the attention of either the trial court or the Court of Appeal. In the appellate court's view, if the defendant believed his behavior after the original probation report might have supported imposition of a lower sentence on resentencing, he would have made a point of informing the trial court about that behavior; the fact that he did not do this supported an inference that he knew there was no such favorable information; and this in turn supported an inference that a supplemental report would not have helped him. (*Begnaud*, *supra*, 235 Cal.App.3d at p. 1556, fn. 7.)

We would not follow this footnote. The negative inferences the appellate court drew from silence are far too speculative. They would be even more speculative in a case like the one before us, in which the supplemental report was mandatory, could be waived only expressly and by a specified procedure, and consequently should have been routine. The possibility of a defendant strategizing upon a hope that a routine and mandatory procedure will be overlooked by both the court and the prosecutor is remote compared with the possibility that the supplemental report was simply overlooked by all. Occam's razor slices off the theory that if the record is silent regarding the defendant's conduct and status after the original probation report, this is because of the defendant's knowledge that any description of him during that time would be bad. One might as well assume that the prosecutor did not bring up the matter because he or she knew a supplemental report would be good.

In our view, a record that is simply silent on the question of the defendant's situation and behavior after the original probation report was prepared is, at least in general, a record that supports a finding that the lack of a supplemental report was

prejudicial. Under conditions of no information about what the supplemental report would have reported, there is a reasonable probability that it would have been helpful to the defendant. A reasonable probability, for purposes of harmless error analysis, does not mean a probability of 50-plus percent. It means "merely a *reasonable chance*." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) On balance, the report would have been either relevant to the court's sentencing discretion and positive, relevant and negative, or neither. With no information about what the contents would have been, we have no foundation for assigning any but equal probabilities to these three outcomes. We can say no more—but also no less—than that there is a reasonable chance it could be any of them.

Llamas is the scenario in which the record contains some information about how the defendant fared in the time after the original probation report, in the form of representations by defense counsel or the defendant at the second sentencing hearing. In that case the court stated that there was no prejudice as part of its discussion of why the court's discretion was not abused; and it also stated that counsel's failure to request a supplemental report did not constitute ineffective assistance because prejudice was not shown. The record affirmatively showed a lack of prejudice, in the appellate court's view: All the information the defendant said a supplemental report could have included—confirmation of completed vocational training and lack of disciplinary problems—actually was brought to the sentencing court's attention by the defense at the sentencing hearing, and the court exercising its discretion nevertheless refused to make the more lenient sentencing decisions he requested. This tended to show that the supplemental report—conveying the same information—would not have helped. (*Llamas, supra*, 67 Cal.App.4th at pp. 39-41.)

The appellate court's reasoning is dubious. The fact that the sentencing court was unmoved by the representations of the defendant and defense counsel should not be relied on to disprove the prejudice of a failure to obtain a probation officer's report. It is *the*

probation officer's information-gathering and evaluation that the rule on supplemental reports aims to secure for the sentencing court's consideration, not the defendant's or defense counsel's claims about what the supplemental report would have said. A trial court's reaction to matters mentioned by the defendant or defense counsel at sentencing thus is not an accurate gauge, probably, of how much good a supplemental probation report might have done the defendant. Unlike the defendant or his attorney, the probation officer is an official of the criminal justice system and is expected to be a neutral reporter and evaluator. Positive information from such a reporter and evaluator is far more likely to have an impact on the sentencing court's thinking than mere claims from the defense.

Our view is that where there *is* evidence in the record of the defendant's situation and behavior after the original probation report was prepared, the effect of that evidence on the question of prejudice depends on the source and character of the evidence. The fact that the trial court was not swayed by mere self-serving representations by the defendant and defense counsel at sentencing tells us little about how it would have reacted to an actual supplemental report.

Dobbins is the third scenario, in which a supplemental report was not obtained, but the record contained evidence of superior quality showing the defendant's conduct after the original probation report was prepared, and the trial court acted on that evidence. This is the only case we found in which the obligation to obtain a supplemental probation report was mandatory and unwaived, yet the failure to obtain it was held to be harmless.

In *Dobbins*, the defendant had already been sentenced to 16 months and placed on probation under a plea agreement. The only question before the trial court was whether to revoke probation, which it did. (*Dobbins*, *supra*, 127 Cal.App.4th at pp. 178-179.) The Court of Appeal held that the trial court's failure to obtain a supplemental probation report was harmless error: It was "not a case in which we must speculate concerning how information in a probation report could have affected the trial court's decision" because "there is no doubt the result would have been the same if a supplemental probation report

had been prepared." (*Id.* at pp. 182-183.) The court so concluded because the defendant's "progress on probation was undoubtedly unsatisfactory by any measure" (*id.* at p. 183) on account of the new offense, for which the defendant was arrested within two months after starting probation, as well as a Proposition 36 progress report, issued about six months before the probation revocation hearing, stating that the defendant had not kept in contact with the probation department and had failed a drug test. (*Id.* at p. 178.)

This is the type of situation in which, in our view, an inference of no prejudice can easily be persuasive. The defendant was before the court because his conduct in the period after the original probation report was criminal, and a recent official report (though not a probation report) showed he had violated other conditions of his probation during that time. The trial court's only decision was the binary one of whether to revoke probation or not. It had no decisions to make about lower, middle or upper terms, or concurrent and consecutive sentences, or whether to strike enhancement allegations. It had all the information it needed to make that simpler decision without the supplemental report.

Quinteros's case is of the silent-record variety: Neither we nor the trial court have received any information about him during the period after the original probation report was filed. Further, the remand order in our prior opinion placed no restrictions on how the trial court would apply the applicable law to resentence Quinteros. We simply vacated the entire sentence because it had been based on inapplicable statutes. The trial court at the resentencing thus had to make from scratch a number of decisions affecting the total length of Quinteros's prison term. All we can say is that the report was mandatory and unwaived, and there is a reasonable chance that it would have contained positive information by which the trial court would have been influenced in one or more of those decisions.

For all the above reasons, we conclude the trial court erred by failing to obtain a supplemental probation report for use in resentencing Quinteros, and the error was not harmless under the *Watson* standard.

We are cognizant of the burden a decision like this can place on victims. The elder victim addressed the court at the resentencing hearing, expressing the very reasonable view that she should not have had to be subjected to the stress of coming back to court years after the trial and revisiting terrible experiences, only to reiterate what she had said before. We also are well aware that the proceedings on remand might not alter the outcome. We are obliged to follow the law, however, and for the reasons stated above, the law requires resentencing.

Nothing in this opinion should be construed as expressing any view about how the trial court should exercise its sentencing discretion after receiving the supplemental report.

DISPOSITION

The sentence is vacated and the case is remanded to the superior court with directions to obtain a supplemental probation report and conduct resentencing proceedings consistent with this opinion. The judgment is affirmed in all other respects.